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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

PANFILO TORRES et al.,

Defendants and Appellants.

C060837

(Super. Ct. No.  
06F02757)

A birthday celebration degenerated into a violent argument over the relative merits of rival gangs. Shouting turned into fighting, and fighting turned into gunfire, resulting in the death of a gang member. An amended information charged defendants Edwin Arthur Stevenson and Panfilo Torres with murder

for the benefit of a criminal street gang. A jury found Stevenson guilty of murder and Torres guilty of the lesser included offense of assault with a firearm. The court sentenced Stevenson to 60 years to life in state prison and Torres to 14 years.

Stevenson appeals, contending insufficient evidence supports his murder conviction, the court erred in admitting gang video recordings, comments made during voir dire tainted the jury pool, instructional error, and sentencing error. Torres appeals, arguing instructional error and sentencing error. We shall direct the abstract of judgment in Stevenson's case be corrected to reflect accurate presentence credits and to delete the 10 year consecutive sentence for the gang enhancement on count one; in all other respects, we shall affirm the judgments.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

In this disturbing reprise of urban violence that afflicts our communities, the volatile combination of alcohol, drugs, and gang rivalry at a birthday celebration yielded tragic results. In the end, the victim, Hector "Bam Bam" Barrera, died of gunshot wounds. Torres shot Barrera in the stomach; Stevenson shot Barrera in the head and back.

An information charged Stevenson and Torres with murder and alleged both defendants personally used a firearm (count one); committed the offense for the benefit of a criminal street gang; and personally discharged a firearm, causing great bodily injury. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b),

(c), (d), (e)(1), 186.22, subd. (b)(1), 12022.7.)<sup>1</sup> The information charged Stevenson with possessing a firearm in violation of probation (count three) and possession of a firearm by a minor ward of the court (count four). (§ 12021, subds. (d), (e).) Codefendant Kenneth Ray Andersen III was also charged with murder (count one), possession of a firearm by a convicted felon (count two), and unlawful discharge of a firearm at an inhabited dwelling (count five). (§§ 12021, subd. (a)(1), 246.) A jury trial followed.<sup>2</sup>

### **The Party**

In the early morning hours of March 26, 2006, Barrera threw his nephew, Mario Gonzales, a birthday party. A few days before the party, Stevenson was standing on a sidewalk when a group of unidentified men pulled up and began shooting. Stevenson's eye was wounded. That did not prevent him from joining the party for Gonzales, which was attended by about 30 people, including Barrera's girlfriend, Heather Boettcher, Andersen, and Torres. Barrera was a member of the Southside Park gang, a subset of the Norteño street gang. Dancing and drinking ensued, with Barrera, Andersen, and others rapping to music in a circle in the living room.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise designated.

<sup>2</sup> The jury acquitted Andersen of murder and unlawful discharge of a firearm, and hung as to the charge of possession of a firearm by a convicted felon.

Nick Morales, a member of the Southside Park gang, also attended. On a second-floor balcony, Barrera and Morales spoke with Raymond Flores, a member of the Oak Park gang. Barrera belittled the Oak Park gang to Flores, saying the gang was weak and would disappear. Barrera and Morales also told Flores that Southside Park was a superior gang and advised him to join.

These taunts devolved into a verbal altercation over which gang was better. Torres joined in and began arguing with Barrera. Torres told his friends Manuel Paz and Flores to wait downstairs, and the duo complied.

Torres and Barrera continued to argue, and Barrera hit Torres in the face. Barrera and Morales began fighting with Torres.

People from downstairs came up to join the battle and began screaming out their gang loyalties. Joshua Allen, a Southside Park gang member, rushed to Barrera's defense. Andersen came upstairs with a gun and told everyone to "Break it up. Let 'em fight one on one."

Torres pulled out a semiautomatic handgun. Torres pointed the gun at Barrera and shot him in the stomach as Barrera struggled with Flores. Everyone fled and Barrera began swinging wildly, hitting several people. Stevenson left and got his rifle out of his car.

Barrera's girlfriend, Boettcher, heard the fight and found Barrera walking hunched over as people punched at him. Boettcher pulled Barrera away, and he told her he had been shot.

He pulled up his shirt, revealing a gunshot wound below his chest.

Boettcher went outside to find Barrera's assailant. She heard someone shout "Oak Park nigga, Oak Park nigga." The wounded Barrera walked outside and said, "What's up, Southside Park," and raised his arms.

Stevenson and Barrera began to argue. Stevenson reached into a gray 1972 Chevrolet Monte Carlo and retrieved his M-1 carbine rifle. Stevenson yelled "West Nick" and cocked his rifle.

Barrera tried to get back into the house. Stevenson fired the rifle four to five times. Barrera was hit by several shots and fell.

Following the shooting, Torres left, carrying his gun. Torres arrived at a residence, and was joined shortly afterwards by Stevenson and Andersen. Andersen gave Flores his gun.

At the party, Boettcher told Barrera's nephew, Gonzales, to get a towel to stanch Barrera's bleeding. Boettcher tried to perform cardiopulmonary resuscitation before the ambulance arrived.

### **The Aftermath**

Later that day, Torres and Flores picked up Fabian Williams in the gray Monte Carlo. They went to the home of Sergio Ramirez, where they began sanding, and later spray painting, the car. Before they could finish, the police arrived.

The officers directed the group to sit on the curb. Williams held a jacket across his lap. When an officer

attempted to handcuff Williams, Williams began to stand up. The officer directed him to sit back down on the curb, and as he did so, a black .45-caliber, semiautomatic handgun fell to the ground. The officers found a chrome colored, nine-millimeter handgun in the back seat of the Monte Carlo.

Approximately six weeks later, officers arrested Stevenson. Stevenson stipulated to owning a .30-caliber carbine rifle, a violation of his probation grant. He also stipulated he had been adjudged a ward of the Sacramento County Juvenile Court for an assault likely to produce great bodily injury. (§ 245, subd. (a)(1).)

### **The Autopsy**

The autopsy on Barrera revealed four gunshot wounds. The first was a graze wound to the left side of his scalp. The bullet did not enter the skull but caused bleeding on Barrera's brain.

The second bullet entered near Barrera's midabdomen. The bullet traveled through the tissue beneath the skin and exited on the lower right side of the abdomen. The third bullet entered Barrera's midback. The bullet pierced the muscles of the back and lodged between the shoulder blade and the top of the arm bone.

The fourth gunshot wound was fatal. It entered Barrera's body through the right lower back, traveling upward and hitting his liver and lung. The bullet hit the right bronchus, which brings air to the lung on the right side, and the trachea, or main airway, and lodged in Barrera's neck.

### **Stevenson's Defense Case**

Gabriel Aguilar testified he did not believe Barrera belonged to a gang. Aguilar, who attended the party, stated several people were fighting on the porch. Barrera was being hit by several people.

After the fighting began, Aguilar turned off the lights because he was "afraid there could be shots fired." He went outside in an effort to calm people down. According to Aguilar, the party had nothing to do with gangs, but was merely a birthday party.

Aguilar testified Gonzales had a gun pointed at his head, but he could not identify who pointed the gun. Aguilar did not see anyone else with a gun. On cross-examination, Aguilar could not identify any of the defendants as being present at the party.

Stevenson testified in his own behalf. Stevenson spoke of his parents, who died of alcohol and drug abuse when he was a young child. He lived with his grandparents until they died in 2004.

After his father died, Stevenson, 10 years old, joined the Norteños, since "[i]t seemed like it was the thing to do." When he was 13, Stevenson's grandparents moved to a Ukiah reservation. While living on the reservation, Stevenson continued to be active in Native American cultural activities, as he had been all of his life.

After the death of his grandparents, Stevenson returned to Sacramento. He was 15 years old. He spent time in custody on

an outstanding warrant and in foster care. Stevenson also lived with Torres; the two had grown up together.

Stevenson did not think Torres was a gang member even though Torres had "West Nick" tattooed on both of his hands. Stevenson and Torres committed crimes together.

In the weeks before the party, Stevenson carried a gun for protection after being the target of several shootings. A few days before the party, Stevenson was the victim of the drive-by shooting that wounded his eye.

Prior to going to the party, Stevenson drank alcohol and took cocaine and Ecstasy. Stevenson went to the party with a group of people. After hearing gunshots, he got his rifle. According to Stevenson, someone was aiming a gun at the crowd, so he turned and shot at that person. He shot two or three times because someone was shooting at him. He shot to scare, not to kill, and denied the shooting was gang related.

After firing the rifle, Stevenson left in a car but could not remember what he did with the rifle. Stevenson was later arrested in Ukiah, where he had gone to scatter his grandmother's ashes.

James Hernandez, a professor of criminal justice, testified on Stevenson's behalf. According to Hernandez, Norteños were "an identity," not a gang. Identifying oneself as a Norteño could mean the person was a gang member or was merely from Northern California. Some children that are removed from a stable family setting use gangs as surrogate families.



An expert in pathology, Curtis Rollins, also testified for Stevenson. Rollins reviewed the autopsy photographs and report. The angle of the entry wound on Barrera's abdomen led Rollins to opine that the person who shot Barrera was a few steps lower than the balcony.

Glenna Gabourie, who was staying at a residence near the party, testified she heard only one "shotgun blast" and heard at least three separate groups of shots. Another neighbor testified she heard three different sets of gunshots.

Stevenson's half brother testified regarding different Native American activities in which his family took part. He testified Stevenson was at home when their father died in the backyard of an overdose; Stevenson was 9 or 10 years old.

A clinical psychologist also testified regarding Stevenson's Native American background and family connections. The psychologist performed a psychological assessment of Stevenson. According to the psychologist, the trauma of finding his father dead when he was 9 or 10 years old caused Stevenson to experience flashbacks, nightmares, and anger. In response, Stevenson began to steal and became violent. The psychologist believed Stevenson's psychological traumas, substance abuse, uprooting, and transplantation into an Hispanic gang culture increased his sensitivity to perceived threats.

#### **Torres's Defense Case**

Torres testified that he is a member of the West Nicholas, or West Nick, subset of the Norteño gang. Prior to joining West Nick, Torres belonged to the Franklon gang.

In 2005 Torres, his brother, and Stevenson left the Franklon gang and started the West Nick gang. Tensions erupted between the old and new gangs over drug profits. Torres sold drugs for both gangs.

Torres had never met Barrera prior to the party and was unaware of any rivalry between the Southside Park and West Nick gangs. Torres owned the .45-caliber handgun confiscated by officers following the shooting. He got the gun for protection after Stevenson was shot by members of the Franklon gang.

The night of the party, Torres drank beer and "could have" smoked marijuana. Andersen told Torres about the party. Torres brought a loaded handgun for protection and rode to the party in a Monte Carlo. Torres found Andersen and Stevenson at the party.

Torres went up to the crowded balcony. He heard partygoers, including Barrera and Flores, saying Southside Park was a better gang and that Oak Park would not exist much longer. Afraid the situation would worsen, Torres wanted to leave. He told Nick Morales that if there was a problem he and his friends would leave.

Barrera took exception to this and began throwing punches, hitting Torres in the face. Torres fell and Morales began hitting him. Morales, Barrera, and another person punched Torres.

While Barrera was on top of him, Torres pulled the gun from his waist, pointed it at Barrera, and shot him. Torres aimed

"toward [Barrera's] stomach and downwards." Torres shot Barrera because he believed he was in danger.

Torres then aimed at the ceiling and shot another round. People scattered and Torres ran to a dark-colored Honda and asked the driver to take him to his mother's house. Torres did not hear any other gunshots, nor did he see Stevenson with a gun.

When arrested the following day, Torres gave officers a fake name and fake birthday. He lied during his interview with the police.

### **Rebuttal**

Henry Jason, a Sacramento police detective, interviewed Torres the day after the shooting. Torres told Jason he was involved in a fight when he fired his gun at the party.

### **Verdict and Sentencing**

The jury found Stevenson guilty of counts one and three. As to count one (murder), the jury found Stevenson personally used and discharged a firearm, causing great bodily injury or death. The jury also found Stevenson was a principal in personally discharging and using a firearm, causing great bodily injury to a nonaccomplice. The jury also found true the allegation that Stevenson committed count one for the benefit of a criminal street gang. The jury found Torres guilty of the lesser included offense to count one of assault with a firearm, and found Torres personally used a firearm during the commission of the offense.

The court sentenced Stevenson to 60 years to life in state prison: 25 years to life on count one, plus an additional, consecutive 25 years to life on the section 12022.53, subdivision (d) enhancement, plus an additional, consecutive 10 years for the section 186.22, subdivision (b)(1) enhancement. The court also sentenced Stevenson to the midterm of two years on count three, but ordered the term to run concurrently with the term imposed on count one. The court sentenced Torres to 14 years in state prison: the upper term of four years on count one, plus an additional 10 years for the section 12022.5, subdivision (a) enhancement.

Both defendants filed timely notices of appeal.

## **DISCUSSION**

### **SUFFICIENCY OF THE EVIDENCE—MURDER**

Stevenson challenges the sufficiency of the evidence in support of his conviction for first degree murder. According to Stevenson, the evidence fails to support a conviction based on either premeditation or lying in wait.

#### **Standard of Review**

In reviewing a defendant's challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence. Substantial evidence is evidence that is credible, reasonable, and of solid value, such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*).)

We do not reassess the credibility of witnesses, and we draw all inferences from the evidence that supports the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

In considering the sufficiency of the evidence of premeditation and deliberation, we consider (1) events before the murder that indicate planning; (2) motive, specifically evidence of a relationship between the victim and the defendant; and (3) method of the killing that is particular and exacting, and evinces a preconceived design to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).) These factors provide a framework to aid in appellate review. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

When evaluating the evidence of lying in wait we need not find defendant lay in wait for any particular length of time. Instead, we determine whether the duration reveals a state of mind equivalent to premeditation or deliberation on defendant's part. (*People v. Stanley* (1995) 10 Cal.4th 764, 794.)

The court instructed the jury on the requirements for premeditated murder. The instructions read, in part: "A defendant has been prosecuted for first degree murder under two theories: (1) the murder was willful, deliberate, and premeditated and (2) the murder was committed while lying in wait or immediately thereafter. [¶] . . . [¶] A defendant is guilty of first degree murder if the People have proved that he

acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before committing the act that caused death.

[¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection. The length of time alone is not determinative."

The court further instructed the jury on murder by lying in wait: "The defendant murdered by lying in wait if: [¶] 1. He concealed his purpose from the person killed; [¶] 2. He waited and watched for an opportunity to act; [¶] and [¶] 3. Then, from a position of advantage, he intended to and did make a surprise attack on the person killed. [¶] The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [¶] A person can conceal his or her purpose even if the person killed is aware of the person[']s physical presence. [¶] The

concealment can be accomplished by ambush or some other secret plan."

### **Discussion**

Stevenson argues the evidence viewed in the light most favorable to the judgment discloses that Barrera was the initiator and aggressor of the sudden quarrel and resulting violence. Stevenson contends he fatally shot Barrera in the midst of a sudden melee, not as the result of premeditation or lying in wait. The record does not support Stevenson's analysis of the evidence.

Ample evidence supported a finding that Stevenson's shooting of Barrera was premeditated. Tensions between two gangs, the Vario Franklin and the West Nick, had been simmering after members of Vario Franklin broke away to form West Nick. Previously, Stevenson belonged to the Vario Franklin gang. However, at the time of the shooting Stevenson had switched allegiances and joined the West Nick gang.

There was some suspicion that the Vario Franklins were responsible for the shooting in which Stevenson was injured prior to the party. As a result of the earlier shooting, Stevenson armed himself with an M-1 rifle for protection.

Stevenson arrived at the party armed and still suffering wounds from the prior shooting. After Torres shot Barrera, someone outside shouted "Oak Park nigga, Oak Park nigga." Barrera walked outside and said "What's up, Southside Park," and raised his arms. Barrera began arguing with Stevenson outside, and Stevenson reached into the car. Very shortly thereafter,

Stevenson yelled "West Nick" and cocked his gun. As Barrera began to go back into the house, Stevenson fired at him. Stevenson fired four to five times.

Stevenson's shooting of Barrera showed premeditation and deliberation. Stevenson arrived at the party bearing wounds from a previous shooting and armed with a gun. He fought with Barrera, who belonged to a rival gang, prior to Torres's shooting Barrera. After the initial shooting, the victim and his assailant traded gang shout-outs, and Stevenson fired at Barrera immediately afterward. Stevenson shot Barrera numerous times.

Although Barrera had previously been involved in a fight with Torres and Stevenson, that fight ended prior to Stevenson's firing his gun. Stevenson shot Barrera numerous times after the latter shouted out his gang's name and Stevenson responded with his gang affiliation. The course of events belies Stevenson's claim that he fired in the heat of passion and without premeditation.

Given Stevenson's actions prior to the shooting, his motive for shooting Barrera, and the method of killing him, we find sufficient evidence in support of Stevenson's conviction for first degree murder. (*Anderson, supra*, 70 Cal.2d at pp. 26-27.)<sup>3</sup>

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<sup>3</sup> Since we find sufficient evidence supports Stevenson's conviction for first degree murder based on premeditation, we need not address his argument over the sufficiency of evidence of lying in wait.



## **ADMISSION OF GANG VIDEO RECORDINGS**

Torres and Stevenson both argue the court violated due process by admitting three video exhibits demonstrating gang activity by a codefendant. Defendants argue the videos were inflammatory and did not involve either defendant.

### **Background**

#### ***The Videos***

Three gang videos, seized from Andersen, were played during the trial. The first video showed a gang fight among several women as Andersen urges them on. Various men are depicted making gang hand signs and gloating over the attack. Andersen shows a gun.

The second video takes place at a gas station, where men make gang signs, break dance, swear, and pump up for a fight. Two men show guns.

The third video shows a party attended by Andersen, who sports a gun in his waistband and a bulletproof vest. Men dance to rap music, show their tattoos, drink beer, and flash gang hand signs.

#### ***The Trial Court's Ruling***

In ruling on Andersen's motion to suppress, the trial court noted: "It is basically generic-type gang information that would perhaps later be used to bolster his opinion in any type of gang case. It gives him information of how gangs conduct themselves when the law enforcement people are not around. And certainly can be used by him in a multitude of ways, in any case."

The prosecution brought an in limine motion to present the three videos. The trial court found the videos extraordinarily probative on a number of issues. According to the court: "It is probative on things such as . . . one's stature within the gang. What the primary activities of the Norteños might be. It would certainly lend support as to what their primary activities are. It definitely lends some support to what the common sign or symbol of the Norteños are [sic] and whether they exist in the first place. It lends significant evidence as to whether there are three or more members of the organization. Whether it was, at least at the time of the videotape, an ongoing organization. Whether there is an interrelationship or a connection between different sets of Norteños. Whether they are, in fact, different sets of Norteños that hang around with each other and, at least at times, are friendly and know each other and are familiar with each other's monikers."

In addition, the court found the videos would support expert testimony that several Norteño subsets exist, and that Norteños associate with the color red and the number 14. The videos also proved probative of the concept of respect being important in the gang culture.

As to an Evidence Code section 352 analysis, the court determined: "There are portions of -- under the 352 analysis . . . while there may be some prejudicial effect, I would say that about any piece of evidence that I would expect a prosecutor to offer, that it has prejudicial effect to it. [¶] The question is whether the probative value of the evidence they

seek to admit is substantially outweighed by a danger of prejudice, misleading the jury, undue consumption of time, and whether it has such a spillover effect that the defendants would be denied their right to a fair trial. And I don't find that to be the case at all under the circumstances of this."

As to the absence of Stevenson and Torres in the videotapes, the court found: "To the extent that [Stevenson and Torres] are not in the videotape, I suppose that is of some value to you because they are not shown doing these type of things. [¶] To the extent Mr. Andersen is, he's the one that chose to place himself on the videotape doing the things that he did do. . . . I will say that it is a revealing insight into the way gang members conduct themselves when surrounded by fellow gang members, it is nothing more than that. It is revealing. [¶] It is for that reason, extraordinarily probative of the way gang members think, act, conduct themselves and is admissible."

The court went on to exclude the last two minutes of the gas station video as not sufficiently probative because it focused on a woman dancing. However, the court found the "content of the party scene where Mr. Andersen is prominently displayed not only throwing the Diamond signs but throwing the Diamond signs with fellow gang members, flashing gang signs, yelling gang statements and indicating what could be attributed [to] the gang mentality, that is certainly probative and supportive of what I would expect a gang expert to say in a

case like this. And it is directly on point to a [section] 186.22[, subdivision] (b)(1)."

Stevenson moved to exclude the videos under Evidence Code section 352. The court denied the motion.

Stevenson requested a limiting instruction, informing the jury that it could not consider the videos against him. In denying the request, the court stated: "It is certainly admissible against Mr. Stevenson as evidence that the Norteños exist, that the common sign or symbol is there, three or more members of an organization, and all the things I previously stated. [¶] That allegation has to be proved against him as it does to each of the defendants. So whether they can actually connect him to this organization, it is not going [to be] done solely by this videotape. But the supporting information as to whether this group exists, whether it was ongoing and whether it qualifies under [section] 186.22[, subdivision] (b)(1), that tape supports that notion; not necessarily whether your client is part of it."

However, the court also solicited a draft limiting instruction from each of the defendants, suggesting an appropriate manner in which the jury could consider the evidence. No such instruction appears in the record.

### **Discussion**

Under Evidence Code section 352, the court has the discretion to determine the admissibility of evidence, weighing the probative value of that evidence against its prejudicial impact. We will not disturb the court's exercise of its

discretion unless we find the court exercised that discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

Stevenson argues there is no evidence he was involved in, participated in, or even knew of the existence of the gang videos. According to Stevenson, the gang videos were inflammatory, depicting brutal violence and gang members engaging in inflammatory conduct. Stevenson contends: "Given the lack of relevance to appellant Stevenson and the inflammatory nature of the video recordings, admitting the challenged evidence was an abuse of . . . discretion."

Though the videos may not have been "extraordinarily probative," as the trial court believed, they were not completely lacking in relevance to Stevenson's case. The videos revealed the Norteños have common identifying symbols, wear gang attire, and use a common gang slang. Contrary to the views of the defense expert, it is not just a regional identity. The brandishing of weapons establishes criminal conduct on the part of the gang. The presence of more than three gang members qualifies the Norteños as a criminal street gang. Viewed in light of all the evidence admitted at trial, the video was not unduly prejudicial. We cannot conclude the trial court's

exercise of discretion was arbitrary, capricious, or patently absurd. The court did not err in admitting the videos.<sup>4</sup>

#### **COMMENTS MADE DURING VOIR DIRE**

Stevenson argues comments made by prospective jurors during voir dire tainted the jury pool, requiring reversal. Torres joins in this argument.

#### **Background**

Specifically, Stevenson objects to statements made by prospective juror E.W. during voir dire. E.W. worked as a correctional officer from 1983 through 1986. He interacted with gang members in the course of that employment.

The court asked if E.W. could set aside his experiences and make a decision based on the facts of the case. E.W. responded that he believed he could set aside his experiences, but "What I do not believe I can do is to judge the veracity of testimony of a gang member because I found them from personal experience to not be trustworthy."

The court asked: "What I am concerned about is the mere designation of an individual as a quote, 'gang member.' [¶] Does that cause you to immediately believe that they are going to lie to you?" E.W. responded: "I would find it difficult to have faith in their testimony."

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<sup>4</sup> Nor do we find the admission of the videos violated Stevenson's due process rights. The trial court gave both defendants the opportunity to draft a limiting instruction for the court's review.

The court continued: "My concern is making sure that both the defendants and the prosecution have 12 jurors that can listen carefully to every witness, not just law enforcement, not just gang members, not just criminalists, not just coroners, but can collectively listen to all the evidence and judge it fairly. [¶] Do you believe you can do that? If not, that's fine. I just need to know." E.W. answered: "I do not believe so, your Honor."

E.W. was excused for cause. Stevenson's counsel moved for a mistrial based on E.W.'s comments, arguing the comments may have tainted the jury pool. Torres's counsel joined in the motion.

The court denied the motion, noting nothing in E.W.'s comments could be construed as expert opinion. The court also stated: "There are certainly jurors throughout this jury selection process who have offered a variety of opinions that . . . could be construed in the way that you have suggested. And if that were the case, it would be difficult to ever have a juror give an answer that was a cause answer and not be the grounds for them to be -- a new panel to be brought in. [¶] It was an isolated response, clearly evidencing his particular experience with state prison inmates that were also gang members that he personally came in contact with and in no way a classification of every gang member as being someone who is dishonest. [¶] Moreover, each of the jurors that's [sic] currently here has indicated that contrary to his belief, they will allow each witness as they take the stand to be evaluated

based on the testimony that the witnesses provide, whether they are police officers, judges, experts, or gang members. [¶] I am . . . completely confident . . . in the responses that our jurors have given and I believe they have given answers and under numerous questions about their ability to do that and they have indicated that they can."

### **Discussion**

A defendant has the constitutional right to a fair and impartial jury. (*People v. Wheeler* (1978) 22 Cal.3d 258, 265.) The trial court possesses great discretion in conducting jury selection. We will not reverse the court's determination unless the exercise of that discretion has resulted in a miscarriage of justice. (Code Civ. Proc., § 223.)

We defer to the court's determination as to whether an individual juror harbors prejudice and reverse only on a clear showing of an abuse of discretion. (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466.) In addition, the court possesses broad discretion to determine whether or not bias or prejudice has so infected the jury panel as to require discharge of the entire panel. A few inflammatory remarks made by prospective jurors do not automatically necessitate such a drastic remedy. Discharging an entire jury panel is a remedy reserved for "the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending [jurors] would be insufficient protection for the defendant." (*People v. Medina* (1990) 51 Cal.3d 870, 889 (*Medina*).)



Stevenson contends prospective juror E.W., who stated he formerly worked as a correctional officer, opined, based on that experience, that gang members are untruthful. This comment, Stevenson argues, coupled with biased comments of other prospective jurors, precluded the seating of a fair and impartial jury.

E.W. made his comments during a voir dire that took place in 2008. E.W. testified he served as a correctional officer from 1983 to 1986, 22 years earlier. In his testimony, E.W. made generic references to gang members; he did not tie his suspicions to any particular gang.

In addition, when asked by the trial court whether he could listen to the evidence and render a fair judgment, E.W. answered he could not. Such a response set E.W. apart from other prospective jurors who answered that they could judge the evidence fairly.

E.W.'s statements regarding gangs pale in comparison to statements made in *Medina*. In *Medina*, a prospective juror stated the defendant's own lawyers believed him to be guilty. Another juror stated the "authorities should 'bring the guilty S.O.B. in, we'll give him a trial, and then hang him.'" (*Medina, supra*, 51 Cal.3d at p. 888.) The Supreme Court found the trial court did not err in rejecting a request to discharge the entire jury panel. (*Id.* at p. 889.)

Here, however, Stevenson argues the jurors' repeated exposure to E.W.'s biased comments, coupled with comments by other prospective jurors, violated his right to due process and

a jury trial. In support, Stevenson relies on *Mach v. Stewart* (9th Cir. 1997) 129 F.3d 495, 498 (*Mach*).)<sup>5</sup>

In *Mach II*, the defendant was charged with oral copulation of an eight-year-old girl. During voir dire, the trial judge elicited from a prospective juror who was a social worker with state child protective services that she had a certain amount of expertise in child abuse. The juror also stated that in every case in which one of her clients reported a sexual assault, the assault had been confirmed. The juror had worked as a social worker for three years. The juror stated at least three more times that she was unaware of any case in which a child had lied about being sexually assaulted. The court excused the juror but denied a defense request for a mistrial based on a tainted jury panel. (*Mach II, supra*, 137 F.3d at pp. 631-633.)

The Ninth Circuit Court of Appeals found the defendant's right to an impartial jury had been violated: "Given the nature of [the prospective juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated [the defendant's] right to an impartial jury." (*Mach II, supra*, 137 F.3d at p. 633.)

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<sup>5</sup> *Mach* was superseded by the second amended opinion found at 137 F.3d 630 (*Mach II*).

Here, in contrast, E.W., during voir dire, stated he had been a correctional officer 22 years before. He did not claim contemporaneous experience with gang members or express an opinion about the specific charged crimes or the defendants. Unlike the juror in *Mach II*, E.W. made no statement that gang members always commit the crimes of which they are accused.

#### **INSTRUCTION ON PRIOR UNCHARGED OFFENSES**

Stevenson contends the trial court erred in instructing the jury pursuant to CALCRIM No. 375 because it allowed jurors to consider evidence of uncharged offenses as circumstantial evidence to prove motive and gang membership subject only to a preponderance standard of proof. Stevenson concedes trial counsel failed to object, but argues this failure constituted ineffective assistance of counsel. Torres joins this argument.

#### **Background**

The court instructed the jury with CALCRIM No. 375 regarding the evidence of uncharged offenses: "The People presented evidence that the defendants committed other offenses that were not charged in this case.

"The People presented evidence of other behavior by the defendants that was not charged in this case.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offense and acts. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the

evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden, you must disregard this evidence entirely.

"If you decide that a defendant committed the offense and acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

"1. The defendant had a motive to commit the offenses alleged in this case; or

"2. As evidence of the defendant[']s membership in a criminal street gang.

"Do not consider this evidence for any other purpose except for the limited purpose of motive and intent or evidence of the defendants' membership in a criminal street gang.

"Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

"If you conclude that the defendant committed the acts, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charges in this case. The People must still prove each element of every charge beyond a reasonable doubt."

### **Discussion**

Defendants argue the instruction improperly applied a preponderance-of-the-evidence standard to circumstantial evidence of uncharged crimes in violation of due process. According to defendants, "Evidence of uncharged offenses, like

all other circumstantial evidence, is subject to the constitutionally-imposed burden of proof beyond a reasonable doubt." Defendants acknowledge that the Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, 1016 (*Reliford*) rejected a similar argument.

In *Reliford*, the court considered CALJIC No. 2.50.01, a similar jury instruction referring to uncharged acts of other sexual offenses. The court found: "Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense in 1991 involving S.B. The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.'" (*Reliford, supra*, 29 Cal.4th at p. 1016.) Therefore, the court determined the jury understood that a conviction which relied on inferences to be drawn from the defendant's prior offense would have to be proved beyond a reasonable doubt. (*Ibid.*)

Similarly, nothing in CALCRIM No. 375 authorizes the jury to apply a preponderance-of-the-evidence standard for any issue other than the question of whether defendant committed the uncharged offense. As we are bound by Supreme Court precedent, we follow *Reliford* and reject defendant's argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).) Defense counsel's failure to object to the instruction did not amount to ineffective assistance of counsel.

### **PRESENTENCE CREDITS**

Stevenson argues his award of presentence credits should be corrected to reflect that he served 942 days in custody rather than 941 days. The People concede the issue and note the abstract of judgment omits the award of actual presentence custody credits and states an unauthorized grant of conduct credit.

Stevenson was arrested on May 16, 2006. He was sentenced on December 12, 2008. Stevenson had served 942 days in custody at the time of sentencing. Therefore, the abstract of judgment shall be corrected to reflect 942 days of custody credit.

In addition, conduct credits are unauthorized for defendants convicted of murder. (§ 2933.2.) The abstract of judgment shall be corrected to delete the unauthorized award of conduct credit.

### **GANG ENHANCEMENT**

In a supplemental brief, Stevenson argues the trial court erred in sentencing him to a consecutive 10-year sentence on the gang enhancement allegation to count one. Since he has been convicted of murder, a crime punishable by a life sentence, the 10 year determinate term enhancement is unauthorized and must be stricken. The People concede the error.

In *People v. Lopez* (2005) 34 Cal.4th 1002, the Supreme Court held that "first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement under section 186.22[, subdivision] (b)(1)(C)." (*Lopez*, at p. 1004.)

Instead, the court found the 15-year minimum parole eligibility term in section 186.22, subdivision (b)(5) applies. (*Lopez*, at pp. 1006-1007.)

Here, Stevenson was convicted of murder and sentenced to 25 years to life. Therefore, Stevenson's 10 year determinate term enhancement should be deleted and replaced with the 15-year minimum parole eligibility term.

#### **MUTUAL COMBAT INSTRUCTION**

Torres contends the trial court's instruction as to mutual combat, CALCRIM No. 3471, was not supported by sufficient evidence. He argues the instruction given violated his right to a jury trial and due process, requiring reversal.

#### **Background**

The prosecution requested the mutual combat instruction. The trial court found the evidence supported the instruction: "It does appear to be, from some of the testimony in this case, that Mr. Torres was engaged in or could have been engaged in mutual combat. He was clearly, from most of the evidence, apparently sucker punched, but there is some issue as to what his conduct was after he was struck, whether he then was engaged in mutual combat, with the people he arrived at the party with joining his side and Mr. Barrera being joined on his side with his fellow party-goers. So it is certainly possible that from the evidence in this case the jury could determine that this was an issue of mutual combat."

Defense counsel objected to the instruction, arguing the evidence revealed two distinct scenarios: either the witnesses

did not see what happened, or Torres was "sucker punched." Defense counsel also argued Torres's reaction to the attack amounted to excessive self-defense rather than mutual combat. No one, defense counsel stated, specifically stated Torres engaged in mutual combat; instead, there was just a general melee.

The court agreed no evidence pointed to Torres as the initial aggressor and deleted the phrase "If you decide that the defendant started the fight using nondeadly force and the opponent responded with such deadly force that the defendant could not withdraw from the fight" from the instruction.

Defense counsel renewed his objection to the mutual combat instruction and the court responded: "I understand your objection. I just simply disagree with you, that it's so clear-cut that there wasn't some time frame between the initial below [sic] by Mr. Barerra and the discharge of the shot. There is a variety of testimony leading to -- from your client's testimony, that he shot immediately -- almost immediately after he was struck and knocked to the ground to other testimony to indicate this fight was an ongoing thing for a considerable period of time before the first shot was fired. [¶] So I think it is simply something the jury is going to have to wrestle with."

The jury was instructed with a modified version of CALCRIM No. 3471: "A person who engages in mutual combat or who is the first one to use physical force has a right to self-defense only if: [¶] 1. He actually and in good faith tries to stop fighting; [¶] 2. He indicates, by word or by conduct, to his



opponent, in a way that a reasonable person would understand, that he wants to stop fighting and that he has stopped fighting; [¶] and [¶] 3. He gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight." The court also instructed pursuant to CALCRIM No. 3472: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force."

### **Discussion**

A mutual combat instruction is warranted where there is evidence from which a jury could reasonably believe both fight participants "actually consented or intended to fight before the claimed occasion for self-defense arose." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1047, italics omitted (*Ross*).) Combat is not mutual without an agreement or consent to fight, but such consent may be implied. (*Id.* at p. 1045.)

Defendants dispute the trial court's assessment that sufficient evidence supported the giving of a mutual combat instruction. At painstaking length, they dissect the testimony the People contend supports the mutual combat instruction. In essence, defendants argue the evidence that Torres intended to fight before the need for self-defense arose is equivocal and does not amount to sufficient evidence.

The evidence of mutual combat may not be overwhelming, and as noted in *Ross, supra*, 155 Cal.App.4th at p. 1043, the phrase itself is plagued by a "dangerously vivid quality" masking

ambiguity and inaccuracy. Still, though the combatants here did not expressly agree to fight, the confrontation between them certainly had elements of a consensual battle between gang members who served as proxies for their respective gangs. Initially, Barrera belittled Torres's gang as weak. Torres told his friends to wait downstairs, as if to declare that he would take on Barrera individually. The argument intensified, and after Barrera hit Torres in the face, other gang members ascended from downstairs, shouting gang slogans. Another gang member, recognizing the physical contest between Torres and Barrera that was underway, raised a gun and told everyone to "Break it up. Let 'em fight one on one." The fight continued, during the course of which Torres escalated the struggle by pulling a gun and shooting Barrera.

This sequence of events is not at all like the facts presented in *Ross, supra*, 155 Cal.App.4th 1033, the case relied on by Torres, where the female victim lost her temper and slapped the defendant, who thereupon punched her in the face. In *Ross*, the court declared that "'mutual combat' consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed*

occasion for self-defense arose.”<sup>6</sup> Under the facts presented in *Ross*, no jury could reasonably find an express or implied agreement to engage in a mutual fight. Not so here. Though Torres did not expressly agree to fight, the jury could reasonably conclude that two gang members impliedly agreed to fight for the honor of their respective gangs, a trivial matter to an outsider but one of deadly import to Torres and Barrera. The court did not err in instructing on mutual combat.

However, even assuming the court erred, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 835; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*).) CALCRIM No. 3471 informed the jury that a person who engages in mutual combat has the right to self-defense under certain circumstances. Torres claims the error was prejudicial because “The court’s having instructed that [Torres] was entitled to the right to self-defense if he had engaged in mutual combat thus effectively removed from the jury’s consideration the only defense [Torres] had.” The argument is without foundation.

Just prior to instructing on mutual combat, the trial court instructed on self-defense, CALCRIM No. 3470. The court instructed: “The defendant acted in lawful self-defense if:

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<sup>6</sup> As we note at pages 38 to 39, *post*, following trial in this case, CALCRIM No. 3471 was revised to add a definition of mutual combat.

"1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in immediate danger of being touched unlawfully;

"2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

"and

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to himself. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense. [¶] . . . [¶]

"If you find that the defendant received a threat from someone else that he reasonably associated with Hector Barrera, you may consider that threat in deciding whether the defendant was justified in acting in self-defense.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of Assault with a Firearm."

The court also instructed the jury with CALCRIM No. 505, informing the jury of a defendant's right to defend himself. In

addition, the court gave CALCRIM No. 571, which instructed the jury that it could find defendant guilty of voluntary manslaughter based on imperfect self-defense if he had an actual, but unreasonable, belief in the need to use deadly force to defend himself.

Amidst this barrage of jury instructions, the court cautioned the jury: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." (CALCRIM No. 200.)

Given the court's instructions, if the jury found mutual combat did not apply given the facts of the case, they were told to disregard the reference to mutual combat. However, this did not eliminate from the jury's consideration evidence of self-defense or imperfect self-defense, on which the court also instructed.

We presume the jury understood and was able to correlate all of the court's instructions. Jurors are well-equipped to analyze evidence and reach a rational conclusion. The jurors' own intelligence and experience prevents them from relying on a factually inadequate theory. (*People v. Scott* (1988) 200 Cal.App.3d 1090, 1095; *Guiron, supra*, 4 Cal.4th at p. 1131.) Based on the instructions given the jury, we find any error in instructing on mutual combat harmless.

### DEFINITION OF MUTUAL COMBAT

In a related argument, Torres contends the court erred in not instructing sua sponte on the legal definition of mutual combat. Anticipating a forfeiture claim, he argues counsel performed ineffectively in failing to request such an instruction.

The trial court instructed on mutual combat but did not include a definition of mutual combat. The court also instructed the jury: "Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings." (CALCRIM No. 200.)

Torres argues the court had a sua sponte duty to provide a definition of mutual combat because that term has a meaning peculiar to the law. In December 2008, subsequent to this trial, CALCRIM No. 3471 was revised to include a definition of mutual combat: "A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose."

The instruction was added following the appellate decision in *Ross, supra*, 155 Cal.App.4th 1033. In *Ross*, the court found the everyday meaning of mutual combat did not adequately convey

what mutual combat means in the context of self-defense: "If A walks up to B and punches him without warning, and a fight ensues, the fight may be characterized as 'mutual combat' in the ordinary sense of those words. But as this example demonstrates, the phrase so understood may readily describe situations in which the law plainly grants one of the combatants a right of self-defense. In the case above, B would be entitled under the law of this state to punch A immediately, without further ado, provided he acted out of an actual and reasonable belief that such action was necessary to avert imminent harm [citation], and he used no more than reasonable force [citation]. That right cannot be forfeited or suspended by its very exercise. Yet that is the effect of relying on the everyday meaning of 'mutual combat.' B's entitlement to strike back in self-defense would then be conditioned, absurdly, on his first refusing to fight, communicating his peaceable intentions to his assailant, and giving his assailant an opportunity to desist. [Fn. omitted.] By then, of course, his assailant might have beaten him senseless." (*Id.* at p. 1044.)

The court in *Ross* formulated the following definition of mutual combat: "not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*. . . . In other words, it is not merely the *combat*, but the *preexisting intention to engage in it*, that must be mutual." (*Ross, supra*, 155 Cal.App.4th at p. 1045.)

In *Ross*, the jury was clearly confused by an instruction on mutual combat that had no evidentiary basis; there was no evidence from which the jury could reasonably conclude that when blows were exchanged, the defendant and his alleged victim had formed the intent to engage in a fight. Indeed, as the appellate court observed, "The trial court, which twice saw the witnesses give their accounts of the incident, appeared to conclude both times that there was *no evidence* of mutual combat." (*Ross, supra*, 155 Cal.App.4th at p. 1050.)<sup>7</sup> It seems that the trial court agreed to give the instruction at the second trial based upon the prosecutor's insistence that he required it for tactical reasons, a reason which the appellate court thought was clearly erroneous. Rejecting the notion that the jury would have ignored an inapplicable instruction, the court noted "the record affirmatively shows that jurors did not ignore the instruction. They petitioned the court in vain to clarify it," thereby demonstrating they misunderstood it. (*Id.* at p. 1056.)

The court in *Ross* acknowledged that a failure to request elaboration of an instruction could result in forfeiture of the issue on appeal. The issue was not forfeited in *Ross* because the mutual combat instruction was inappropriately given and the confused jury's request for guidance was denied by the trial court. Unlike the situation faced in *Ross*, the instruction was

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<sup>7</sup> The jury could not agree on a verdict in the first trial. (*Ross, supra*, 155 Cal.App.4th at p. 1041.)



appropriate here, and neither counsel for Torres nor the jury sought clarification of it. At most, all that can be said of the instruction is that greater clarity could have been provided had mutual combat been defined. In short, the instruction was ambiguous. "For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Mayfield* (1997) 14 Cal.4th 668, 777.) In making that determination, we presume the jury followed and understood the instructions, and considered the instructions as a whole, not simply a single instruction or isolated parts of an instruction. (*People v. Harrison* (2005) 35 Cal.4th 208, 252; *People v. Morales* (2001) 25 Cal.4th 34, 47; *People v. Holt* (1997) 15 Cal.4th 619, 677.)

As pointed out earlier, Torres ignores other instructions provided by the trial court, including CALCRIM Nos. 3470 and 505 on self-defense and CALCRIM No. 571, instructing the jury that it could find defendant guilty of voluntary manslaughter based upon imperfect self-defense. Torres has made no showing that the jury failed to understand and correlate all the instructions, and thus has not demonstrated error requiring reversal. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)<sup>8</sup>

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<sup>8</sup> Since we find no prejudice, we need not address Torres's ineffective assistance of counsel argument.

## **INSTRUCTION ON RIGHT TO USE A GUN IN SELF-DEFENSE**

Torres argues the court violated his constitutional rights by failing to grant trial counsel's request to instruct that whether or not Torres possessed the firearm legally was irrelevant to the determination of whether Torres shot Barrera in lawful self-defense. Torres contends there was ample evidence from which the jury could infer that he illegally possessed the firearm.

### **Background**

The trial court instructed with CALCRIM No. 505 as to Stevenson: "The right to use deadly force, including a gun, in self-defense does not require the weapon to be possessed legally. If a defendant has the right to use self-defense, the right exists even if the weapon used was possessed illegally." Torres requested the same language be added to CALCRIM No. 3470, the right to self-defense of another nonhomicide.

The court denied Torres's request, explaining: "The reason that the language was put in there [CALCRIM No. 505] on [Stevenson's] request for his client is because of the allegation that his client was possessing the firearm illegally, either as a Court order -- by stipulation, he was not permitted to possess a firearm. So I understand where his concern came from. [¶] There is no such allegation or claim that [Torres] was not entitled to possess a weapon like any other citizen. He was not entitled to possess a weapon loaded and concealed, nor is any other citizen in California. But I don't think adding additional language under those circumstances is necessary."

The court further noted the record was clear: Stevenson was under a court order not to possess a firearm and therefore it needed to be made clear to the jury that this fact did not prevent him from using self-defense. In contrast, there was no allegation or charge that Torres possessed his firearm illegally, no court order, and no prior felony conviction. According to the court, "There is, in fact, no language in any of these instructions that suggests, in any way, that [Torres's] possession of the firearm was anything other than legal. [¶] And while it may be that there is a Penal Code section under 12025 or 12031 that would prevent him from illegally possessing the firearm, the jury would have no way of knowing that because it is simply not a charge in this case. [¶] But the language approved by CALCRIM under 3470, based on the circumstances of this case, adequately and sufficiently describe self-defense as it would apply to Mr. Torres. [¶] So I understand your request. I am simply denying it. [¶] . . . [¶] . . . You are certainly free to argue it."

The court proceeded to instruct with CALCRIM No. 3470.

### **Discussion**

The court has a duty to instruct on all general principles of law that are closely and openly connected with the facts of the case. (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) A defendant has a right to an instruction that pinpoints the theory of the defense. A pinpoint instruction relates particular facts to the elements of the charged crime and explains or highlights a defense theory. (*People v. Barton*

(1995) 12 Cal.4th 186, 197 (*Barton*); *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.) However, a trial court is not required to give an instruction when the evidence supporting such an instruction is minimal and insubstantial. (*Barton, supra*, 12 Cal.4th at p. 201.)

Torres asserts sufficient evidence supported his request for the court to instruct that his right to self-defense existed even if he possessed the gun illegally. Torres argues his "penchant for ignoring legal requirements for otherwise legal acts," his gang membership, and his numerous prior convictions could have led the jury to reasonably infer he illegally possessed the handgun with which he shot Barrera.<sup>9</sup>

We disagree. In Stevenson's case, he was charged with possessing a firearm in violation of his probation conditions. Torres was not charged with any violation connected to possession of a firearm.

However, Torres contends the court's statement that he had no prior convictions was "especially unfounded." Torres points out he had affirmed he had been "convicted of a couple of things," "of auto theft twice," of "[e]vading the police recklessly," and of "resisting an executive or police officer." According to Torres, the "jurors could not be expected to

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<sup>9</sup> Torres's penchant for ignoring legal requirements for otherwise legal acts consists of his driving a car without a license.

understand that these convictions did not make [Torres] a felon subject to the prohibition on felons possessing firearms.”

To make this connection, jurors would have to know that a convicted felon could not possess a firearm legally, and that Torres had indeed been convicted of a felony. Neither part of this equation was part of the evidence introduced at trial. The jurors were not informed that felons could not possess weapons legally or that Torres had been convicted of a felony. Torres’s request for an instruction that the right to self-defense does not require that the weapon be possessed legally is based on insubstantial evidence, and the court did not err in denying the request. (*Barton, supra*, 12 Cal.4th at p. 201.)<sup>10</sup>

#### **RESTITUTION FINES**

Torres argues that even though he was acquitted of any charges relating to Barrera’s death, the court imposed on him fines for that death. According to Torres, the court erred and the fines must be stricken.

#### **Background**

In sentencing Torres, the trial court commented: “[W]hen viewed in its entirety . . . Mr. Torres is [the] one who claims

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<sup>10</sup> Torres argues the conspicuous absence from CALCRIM No. 3470 of the paragraph about illegal gun possession in CALCRIM No. 505 “would reasonably lead the jury to conclude that illegal possession of a firearm used would defeat a claim of self-defense to assault with that firearm.” We disagree. We presume the jury followed and understood the court’s instructions; the court did not instruct that illegal possession of a firearm precluded a finding of self-defense.

to be a gang leader of a criminal street gang. [¶] He chose on this occasion to arm himself with a firearm that was loaded, that he knew was loaded, and it was his possession of that firearm, his willingness to use the firearm, and ultimately his use of the firearm which escalated this event to one which involved deadly force and the discharge of multiple firearms. [¶] It was his involvement and choice in his life to engage in gang-related criminal activity. It was his choice to depart a gang he previously was involved with to start his own gang. It was his choice to involve himself and his brother and younger members of the community in his illegal and dangerous and violent endeavors. [¶] And, to some degree, I agree with the victim's sister. It was his almost brotherly relationship with the youthful Mr. Stevenson but [sic] certainly assisted Mr. Stevenson in embracing this lifestyle. [¶] . . . [¶] . . . He's demonstrated a complete unwillingness to comply with society's rules and norms, and he chose to engage in the conduct here which, while not legally responsible beyond a reasonable doubt, according to jury verdict, for the death of the victim in this case, clearly complicit in conduct that led to his death. [¶] And there may be not a legal responsibility for you, and there is not. I think the jury did an appropriate thing with you. They returned a verdict consistent with the evidence they heard, and they separated you from Mr. Stevenson in a legal context. [¶] But in terms of culpability for his death, you share equally in that. It was your conduct, your leadership role, which ultimately began the set of circumstances; and it

was your discharge of that weapon that ultimately led to the willingness of others to then discharge firearms."

The court imposed restitution to the victim in the amount of \$1,100 pursuant to section 1202.4 and \$1,607.23 to the victims of violent crime (the California Victim Compensation Program). Torres's counsel objected to the imposition of the restitution fine. The court responded: "I am not utilizing his culpability in terms of the ultimate death, not in a legal fashion. The reason I was making that connection as to his responsibility from an overall perspective of this case to the death is because I think the joint and several responsibility for the funeral expenses based on that are appropriate, even though he wasn't legally convicted of the homicide. I am not using those facts at all in justifying the upper term."

### **Discussion**

Trial courts possess broad discretion to order restitution for a victim. (*People v. Rubics* (2006) 136 Cal.App.4th 452, 462 (*Rubics*).) We review a restitution order for an abuse of discretion and do not reverse unless the order is arbitrary, capricious, and exceeds the bounds of reason. (*People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409.)

We construe a victim's right to restitution ""broadly and liberally."" (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) The trial court is required to order restitution to crime victims, and the court has the authority to make the obligation of multiple codefendants joint and several. (*People v. Neely* (2009) 176 Cal.App.4th 787, 800.) If the

circumstances justify the trial court's findings in a restitution order, we will not overturn the judgment if the circumstances might also reasonably support a different finding. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.)

Torres argues the court abused its discretion in ordering him to pay restitution for expenses related to Barrera's murder because he was not convicted of Barrera's murder. He was only convicted of assault with a firearm, which shooting did not cause Barrera's death. Torres further contends the trial court's casting of him as Fagin to Stevenson's Oliver Twist, luring an innocent into crime, was not supported by the record.

We disagree. The evidence at trial supported the court's finding that Torres set in motion the tragic chain of events leading to Barrera's death. Torres and Stevenson fought with Barrera. Following the fight, Torres shot Barrera, and shortly afterwards, Stevenson shot Barrera, killing him.

Torres cites *Rubics, supra*, 136 Cal.App.4th 452 for the proposition that restitution must be for economic damages resulting from the crime of which the defendant was convicted, not merely those reasonably related to the crime. (*Id.* at p. 460.) In *Rubics*, the defendant argued the court erred in ordering restitution because the victim's funeral expenses were caused by an auto accident, not by the defendant's leaving the scene of the accident. The defendant pled only to felony hit and run, not to causing the accident. (*Id.* at p. 461.)

The court rejected the defendant's argument. The facts revealed the defendant made an unsafe turn in front of the



victim, causing the victim to veer into oncoming traffic. The accident investigator determined that the defendant caused the accident by failing to yield before he turned. The court determined that since the defendant was involved in the accident that caused the victim's death, it was proper for the court to order the defendant to pay the victim's funeral expenses.

(*Rubics*, *supra*, 136 Cal.App.4th at pp. 461-462.)

Torres argues, under *Rubics*, that restitution cannot be imposed because he was not the cause of Barrera's death. However, Torres's action in shooting Barrera in the stomach escalated an atmosphere already ripe for violence. As the court in *Rubics* stated, restitution must be for economic damages resulting from the crime of which the defendant is convicted, not merely those "reasonably related" to the crime. (*Rubics*, *supra*, 136 Cal.App.4th at p. 460.) Torres's shooting of Barrera began the chain of events that ultimately led to Barrera's death, much as the actions of the defendant in *Rubics* ultimately led to the fatal collision. Torres's actions were not merely "reasonably related." We find no error in the court's restitution order.

#### **UPPER TERM FOR ASSAULT AND GUN ENHANCEMENT**

Torres argues the court erred in imposing the upper term on the assault and gun enhancement convictions. According to Torres, the court used juvenile adjudications, in which he had not been afforded the right to a jury trial, to impose the upper term in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*).

## **Background**

The court sentenced defendant to the upper term on the assault and gun enhancement based on three aggravating factors: defendant had prior juvenile adjudications, he was on probation at the time of the crime, and he engaged in violent conduct indicating a serious danger to society.

## **Discussion**

Torres acknowledges his argument has been rejected by the Supreme Court in *People v. Nguyen* (2009) 46 Cal.4th 1007 (*Nguyen*). However, he raises the issue to preserve his rights to federal review.

In *Nguyen*, the Supreme Court held "the absence of a constitutional or statutory right to jury trial under the juvenile law does not, under *Apprendi*, preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person." (*Nguyen, supra*, 46 Cal.4th at p. 1028.)

Torres also contends the trial court relied on erroneous information regarding his juvenile adjudications. During sentencing, the court stated: "His decision while on a grant of probation and after prior history of juvenile convictions or juvenile adjudications involving crimes that are, in fact, specified in [section] 186.22[, subdivision] (b)(1) as gang-related or gang-type crimes, to then conduct himself in the way that he did on this occasion warrant nothing but the high term." Torres argues only the unlawful taking and driving is listed as

a section 186.22 crime; the other juvenile adjudications -- evading, vandalism, and resisting arrest -- are not.

The court did not rely on erroneous information; Torres was convicted of a gang-related crime. He admitted to being convicted of automobile theft twice and acknowledged that other gang members were involved in one of the vehicle thefts.

#### **UPPER TERM**

Finally, Torres claims the court's imposition of the upper term on the assault and gun enhancement based on Torres's probation status and his having engaged in violent conduct violated his rights to a jury trial and to due process. Again, Torres acknowledges a Supreme Court opinion to the contrary. (*People v. Towne* (2008) 44 Cal.4th 63.) We are required to follow Supreme Court precedent and need not address Torres's claim. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.)

#### **DISPOSITION**

The abstract of judgment in Stevenson's case shall be corrected to reflect the correct number of presentence custody credits, and to delete the 10-year gang enhancement term on count one and replace it with the 15-year minimum parole eligibility term. In all other respects the judgments are affirmed.

\_\_\_\_\_, RAYE, P. J.

We concur:

\_\_\_\_\_, BLEASE, J.

\_\_\_\_\_, HULL, J.